

## TALKING PONTS:

***INTERNAL GUIDANCE FOR USG DELEGATION***

United States/Core Reservations to Forced Disappearances draft instrument

The United States has core reservations to the forced disappearances treaty text regarding the following Articles. We include below the proposed text of the United States for such articles or sub-articles, followed by principal reasons for the changes. (Objections of the United States to other treaty provisions have been noted during the course of the sessions of the Working Group.)

**1) RIGHT TO THE TRUTH - Preamble paragraph 7:**

"Affirming the right of any person not to be subject to an enforced disappearance, the right of victims to justice and to reparation, and their freedom to seek, receive and impart information about the circumstances of an enforced disappearance and the fate of the disappeared person,"

**Article 24(2)**

"Each victim has the freedom to seek, receive, and impart information regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."

- This proposal draws text verbatim from the ICCPR.
- The United States has undertaken international and domestic legal obligations with regard to freedom of information under ICCPR Article 19(2) and freedom of information and sunshine laws in the United State.
- We have not recognized the right to know the truth in a legally binding instrument.
- Nor have we recognized the right to truth in a non-binding document without linkage to freedom of information.
- With regard to the right to know, our position has not changed since the ICRC Conference on the Missing in February 2003 as well as the 28<sup>th</sup> ICRC/Red Cross Conference in December 2003.
- The US is committed to advancing the cause of families dealing with missing persons; however we do not acknowledge any new international right or obligation in this regard.

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- At the December 2003 ICRC/Red Cross Conference, my government acknowledge that a "right to know" is referred to in Article 32 of the 1977 API to the Geneva Conventions, but for the US, which is not a party to that instrument, it is only "in the spirit" of that Article that families be informed of the fate of their missing family members.
- Furthermore, as noted the US has not adopted API and therefore has no obligations with respect to any "right to truth" under that instrument.

## 2) DEFINITION - Article 2

"For the purposes of this instrument, enforced disappearance is considered to be the arrest, detention, or abduction of a person by or with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, with the intention of removing that person from the protection of the law for a prolonged period of time."

- Human rights and other treaties (e.g. CAT, Convention against Genocide, Terrorist Bombing Convention) that contain a definition of a crime expressly include an intentionality requirement, which is a due process requirement under the United States (and most other) criminal law systems.
- In view of obligations that will be undertaken by States Parties to this instrument regarding investigation, prosecution, extradition, "found in jurisdiction", rendering legal assistance, non-refoulement, command responsibility, and elimination of a defense of superior order, due process and fundamental fairness require that the crime of forced disappearances be defined with intentionality, precision and clarity.
- Intentionality and precision are also required to ensure that lawful law enforcement and military activities are not captured within the definition of the crime.

## 3) CRIMINALIZATION - Article 4

"Each State Party shall take the necessary measures to ensure that an enforced disappearance is fully covered under its criminal or penal law."

- The proper objective of this article should be to ensure that a forced disappearance is covered by the penal code of all states parties and is punishable by appropriately severe penalties.
- Requiring States Parties to enact an autonomous offense of forced disappearance would be unworkable in a federal system.
- In the United States, 51 new statutes, one for the federal system and one for each of the fifty states, would need to be enacted to implement the criminalization provision as worded in the proposed convention text.

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**4) CRIME AGAINST HUMANITY - Article 5 -**

**Delete**

- Requiring domestic legislation criminalizing crimes against humanity may not be realistic in many states and could have widespread implications under international law.
- However such implications are left undefined in the treaty text, thereby leaving totally unclear the obligations imposed on a state party under this article.
- This article is written in preambular, vague, and aspirational language and is wholly inappropriate as an operative treaty provision.

**5) LACK OF DEFENSE OF SUPERIOR ORDERS - Article 6(2)**

"No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance if the accused knew that the order was unlawful or a person of ordinary sense and understanding would have known the order to be unlawful."

- We were able to support elimination of a superior orders defense in the Torture Convention because there we took the view that torture was limited to deliberate and calculated acts of an extremely cruel and inhuman nature, which an individual of ordinary sense would know to be criminal.
- If the definition of forced disappearance were properly circumscribed and contained an intent requirement, we would be in a position to accept the elimination of the superior orders defense.
- The vague and overbroad definition of forced disappearance in the treaty text could capture lawful law enforcement and military activities, and thus fundamental fairness requires maintenance of the superior orders defense.

**6) "FOUND IN" JURISDICTION - - Article 9**

**DELETE**

- The United States supports an extradition regime for forced disappearances rather than prosecution under a "found in" jurisdiction regime. Extradition allows prosecution by the State with the greater interest and the greater ability to prosecute successfully, where witnesses and evidence are readily available.

**7) NON-REFOULEMENT - Article 16(2) & (3)**

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2. "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"

3. "The benefit of the present provision may not, however, be claimed by a person whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. "

- We believe that this provision should conform to international law on non-refoulement, as reflected in the United States proposal for this article.
- This instrument is not the appropriate forum to rewrite refugee and non-refoulement law.

### **8) ACCESS TO PLACES OF DETENTION - Article 17, including 17(2) (e)**

"guarantee access by the competent authorities and legally authorized institutions to the places where persons are deprived of liberty, if necessary with the prior authorization of a judicial authority;"

- Access to places of detention must be in conformity with the constitutional and legal provisions of the law of a state party. The entirety of Article 17 should be reworded to reflect this position.

### **9) TREATY MONITORY BODY - Article 26 – The United States firmly supports use of an existing treaty body, the Human Rights Committee.**

- The Human Rights Committee already has jurisdiction over forced disappearances, which violate numerous provisions of the ICCPR.
- The Human Rights Committee should continue to perform this monitoring role, including under this instrument, for reasons of:
  - expertise,
  - consistency of jurisprudence,
  - efficiency,
  - avoidance of redundancy, and
  - cost savings.
- In view of the specific proposal of the High Commissioner on Human Rights to create a single, unified, standing treaty body, and the widespread acknowledgement of the need for treaty body reform, the creation of a new body at this juncture makes little sense.

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